

ASSEMBLY BILL

No. 1444

Introduced by Assembly Member Jerome Horton

February 22, 2005

An act to amend Section 411.35 of the Code of Civil Procedure, relating to malpractice actions.

LEGISLATIVE COUNSEL'S DIGEST

AB 1444, as introduced, Jerome Horton. Malpractice actions: real estate brokers or salespersons.

Existing law requires the attorney for the plaintiff or cross-complainant in any action arising out of the professional negligence of an architect, professional engineer, or land surveyor to file and serve a certificate declaring either that the attorney has consulted and received an opinion from an architect, professional engineer, or land surveyor, licensed to practice in this state or in any other state, or that the attorney was unable to obtain that consultation for specified reasons.

This bill would make this provision also applicable to any action arising out of the professional negligence of a real estate broker or salesperson, and would require the attorney for the plaintiff or cross-complainant to file and serve a certificate declaring either that the attorney has consulted and received an opinion from a real estate broker, or that the attorney was unable to obtain that consultation for specified reasons.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 411.35 of the Code of Civil Procedure is amended to read:

411.35. (a) ~~In~~ *On or before the date of service of the complaint or cross-complaint on any defendant or cross-defendant, the attorney for the plaintiff or cross-complainant shall file and serve the certificate specified by subdivision (b) in every action, including a cross-complaint for damages or indemnity, arising out of the professional negligence of a any of the following:*

(1) *A person holding a valid architect's certificate issued pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, or of a.*

(2) *A person holding a valid registration as a professional engineer issued pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or a.*

(3) *A person holding a valid land surveyor's license issued pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code on or before the date of service of the complaint or cross-complaint on any defendant or cross-defendant, the attorney for the plaintiff or cross-complainant shall file and serve the certificate specified by subdivision (b).*

(4) *A person holding a valid real estate broker or salesperson license issued pursuant to Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code.*

(b) A certificate shall be executed by the attorney for the plaintiff or cross-complainant declaring one of the following:

(1) ~~That~~ *In the case of an architect, professional engineer, or land surveyor, that the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in this state or any other state, or who teaches at an accredited college or university and is licensed to practice in this state or any other state, in the same discipline as the defendant or cross-defendant, and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the*

1 attorney has concluded on the basis of this review and
 2 consultation that there is reasonable and meritorious cause for the
 3 filing of this action. *In the case of a real estate broker or*
 4 *salesperson, that the attorney has reviewed the facts of the case,*
 5 *that the attorney has consulted with and received an opinion*
 6 *from at least one real estate broker licensed to practice in this*
 7 *state and currently engaged in the business of real estate, and*
 8 *who the attorney reasonably believes is knowledgeable in the*
 9 *relevant issues involved in the particular action, and that the*
 10 *attorney has concluded on the basis of this review and*
 11 *consultation that there is reasonable and meritorious cause for*
 12 *the filing of this action.* The person consulted may not be a party
 13 to the litigation. The person consulted shall render his or her
 14 opinion that the named defendant or cross-defendant was
 15 negligent or was not negligent in the performance of the
 16 applicable professional services.

17 (2) That the attorney was unable to obtain the consultation
 18 required by paragraph (1) because a statute of limitations would
 19 impair the action and that the certificate required by paragraph
 20 (1) could not be obtained before the impairment of the action. If
 21 a certificate is executed pursuant to this paragraph, the certificate
 22 required by paragraph (1) shall be filed within 60 days after filing
 23 the complaint.

24 (3) That the attorney was unable to obtain the consultation
 25 required by paragraph (1) because the attorney had made three
 26 separate good faith attempts with three separate architects,
 27 professional engineers, ~~or~~ land surveyors, *or real estate brokers*
 28 to obtain this consultation and none of those contacted would
 29 agree to the consultation.

30 (c) Where a certificate is required pursuant to this section,
 31 only one certificate shall be filed, notwithstanding that multiple
 32 defendants have been named in the complaint or may be named
 33 at a later time.

34 (d) Where the attorney intends to rely solely on the doctrine of
 35 “res ipsa loquitur,” as defined in Section 646 of the Evidence
 36 Code, or exclusively on a failure to inform of the consequences
 37 of a procedure, or both, this section shall be inapplicable. The
 38 attorney shall certify upon filing of the complaint that the
 39 attorney is solely relying on the doctrines of “res ipsa loquitur” or

1 failure to inform of the consequences of a procedure or both, and
2 for that reason is not filing a certificate required by this section.

3 (e) For purposes of this section, and subject to Section 912 of
4 the Evidence Code, an attorney who submits a certificate as
5 required by paragraph (1) or (2) of subdivision (b) has a privilege
6 to refuse to disclose the identity of the architect, professional
7 engineer, ~~or~~ land surveyor, *or real estate broker* consulted and
8 the contents of the consultation. The privilege shall also be held
9 by the architect, professional engineer, ~~or~~ land surveyor, *or real*
10 *estate broker* so consulted. If, however, the attorney makes a
11 claim under paragraph (3) of subdivision (b) that he or she was
12 unable to obtain the required consultation with the architect,
13 professional engineer, ~~or~~ land surveyor, *or real estate broker*, the
14 court may require the attorney to divulge the names of architects,
15 professional engineers, ~~or~~ land surveyors, *or real estate brokers*
16 refusing the consultation.

17 (f) A violation of this section may constitute unprofessional
18 conduct and be grounds for discipline against the attorney, except
19 that the failure to file the certificate required by paragraph (1) of
20 subdivision (b), within 60 days after filing the complaint and
21 certificate provided for by paragraph (2) of subdivision (b), shall
22 not be grounds for discipline against the attorney.

23 (g) The failure to file a certificate in accordance with this
24 section shall be grounds for a demurrer pursuant to Section
25 430.10 or a motion to strike pursuant to Section 435.

26 (h) Upon the favorable conclusion of the litigation with
27 respect to any party for whom a certificate of merit was filed or
28 for whom a certificate of merit should have been filed pursuant to
29 this section, the trial court may, upon the motion of a party or
30 upon the court's own motion, verify compliance with this
31 section, by requiring the attorney for the plaintiff or
32 cross-complainant who was required by subdivision (b) to
33 execute the certificate to reveal the name, address, and telephone
34 number of the person or persons consulted with pursuant to
35 subdivision (b) that were relied upon by the attorney in
36 preparation of the certificate of merit. The name, address, and
37 telephone number shall be disclosed to the trial judge in an
38 in-camera proceeding at which the moving party shall not be
39 present. If the trial judge finds there has been a failure to comply
40 with this section, the court may order a party, a party's attorney,

1 or both, to pay any reasonable expenses, including attorney's
2 fees, incurred by another party as a result of the failure to comply
3 with this section.

4 (i) For purposes of this section, "action" includes a complaint
5 or cross-complaint for equitable indemnity arising out of the
6 rendition of professional services whether or not the complaint or
7 cross-complaint specifically asserts or utilizes the terms
8 "professional negligence" or "negligence."

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